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Supreme Court, U.S.
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No. 04-1081

IN THE

Supreme Court of the United States

Frank J. Crosby,
Individually and on Behalf of All Others
Similarly Situated,

Petitioner

v.

Bowater Incorporated Retirement Plan for Salaried
Employees of Greater Northern Paper Inc. and
Bowater Incorporated,

Respondents

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

Reply in Support of Petition for Writ of Certiorari

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COMMENT ON JURISDICTION

Pursuant to 29 U.S.C. §1144(a), ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C.] section 1003(a)." ERISA further states that, except for actions under 29 U.S.C. §1132(a)(1)(B) in which state courts have concurrent jurisdiction, "the district courts of the United States shall have exclusive jurisdiction of civil actions under [subchapter I of ERISA]." 29 U.S.C. §1132(e). Accordingly, and contrary to the suggestion in Respondents' Statement of Jurisdiction, the Sixth Circuit had subject matter jurisdiction, as did the District Court.

REBUTTAL

I. The Petition Clearly Satisfies Rule 10.

As their first avenue of attack, Respondents argue that Crosby's Petition fails the Rule 10 criteria because it does not (1) identify a "conflict" between the Courts of Appeals, or (2) raise an important issue of federal law. Respondents' Brief ("RB") at 2. The cases cited in Crosby's Question Presented, all decided within the past year, reveal that the Circuits are in conflict on the important issue of redress for statutory violations under ERISA, and that they have inconsistently applied and continue to inconsistently apply this Court's rulings in Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 202 (2002), regarding ERISA §502(a)(3) remedies. Simply put, they are in a state of disarray and utter confusion as to the proper application of those rulings.

For example, the Second, Third, Fourth, Ninth and Eleventh Circuits hold that equitable *monetary* relief may be awarded under §502(a)(3). See Petition at iv (citing cases) and Schaffer v. Westinghouse Savannah River Co., No. 04-1347; 2005 WL 567812 (4th Cir. Mar. 11, 2005) (payment of additional pension benefits would constitute an "equitable remedy" under ERISA §502(a)(3); remanded to determine whether

amount sought was "appropriate"); Rubin-Schneiderman v. Merit Behavioral Care Corp., No. 03-9111-CV; 2005 WL 229862 (2nd Cir. Jan. 31, 2005) ("We also note Justice Ginsburg's statement in her concurrence in *Davila* that '§502(a)(3) may "allo[w] at least some forms of 'make-whole' relief against a breaching fiduciary.'" . . .(quoting Brief for Unites States as Amicus Curiae at 27-28 n. 13)") (remanded for consideration of plaintiff's fiduciary duty claim under §502(a)(3)); Jones v. American Gen. Life & Accident Ins. Co., 370 F.3d 1065 (11th Cir. 2004) (where defendants allegedly misrepresented that life insurance benefits would be provided and plaintiffs made their financial plans accordingly, plaintiffs could pursue recovery of the benefits under §502(a)(3) on theory that defendants breached their fiduciary duties); and Post v. Kidspeace Corp., Nos. 02-4328 and 02-4402 (3rd Cir. Apr. 27, 2004) (§502(a)(3) permits an ERISA beneficiary to recover benefits under an estoppel theory).

On the other hand, the Sixth, Eighth and Tenth Circuits squarely hold that such relief is not available under §502(a)(3), while the Fifth Circuit has equivocated as to whether such relief is available under the statute. See Petition at iv (citing cases) and Milofsky v. American Airlines, Inc. No. 03-11087; 2005 WL 605754 (5th Cir. Mar. 16, 2005) (under §502(a)(3), plaintiffs could recover losses to their 401(k) accounts resulting from fiduciary breaches, but only if the relief was not compensatory) (affirmed dismissal because claim was brought under §502(a)(2)); Calhoon v. Trans World airlines, Inc., No. 04-2070; 2005 WL 544816 (8th Cir. Mar. 9, 2005) (medical expenses incurred as a result of plan fiduciary sending COBRA premium coupons to wrong address not recoverable under §502(a)(3)). Pity the participant who must litigate (or has litigated) his §502(a)(3) claim to redress a violation of ERISA's statutory standards in one of these Circuits. Of course, the right to an equitable *monetary* remedy under §502(a)(3) should not depend on the Circuit in which the claim is litigated. But, at this time it *does*; and *that* is ample reason to grant the Petition.

Furthermore, for claims like Crosby's that seek benefits

owed under ERISA's minimum benefit rules, but not under an express plan provision, as in Great-West, ERISA §502(a)(3) represents the only ERISA remedial statute under which the plaintiff may recover his benefit shortfall. Thus, the Court must determine if Congress, in enacting ERISA's remedial framework, intended to (1) confer a statutory right upon participants under the minimum benefit rules, but leave such participants without a remedy, and (2) permit plans and plan sponsors to violate those rules with impunity. If that is not an important federal question, it is difficult to fathom what is.

II. The Relief Sought Is "Appropriate."

Respondents contend that the relief sought by Crosby is not "appropriate" because (1) "Crosby sued to recover additional benefits he claimed were due under the terms of the Plan", and (2) under Varity Corp. v. Howe, 516 U.S. 489, 515 (1996), if the participant has an "adequate" remedy under ERISA §502(a)(1)(B) (for benefits due under the terms of the plan), he may not recover under ERISA §502(a)(3). RB at 7-8. Respondents never made this argument in the courts below. Accordingly, or perhaps because the relief sought is so obviously appropriate, the Sixth Circuit addressed only whether the relief sought was equitable.

If Crosby's statutory claim were to be characterized in the manner suggested by Bowater (i.e., as a contract claim), it would no longer be the same substantive claim. Varity requires no such pleading for claims based on violation of ERISA's standards. On the contrary, Varity held that (1) plaintiffs properly brought their statutory violation claim under §502(a)(3) because they could not recover under §502(a)(1)(B) (i.e., under the terms of the plan) or any other ERISA remedial provision; and (2) §502(a)(3) provides appropriate equitable relief for "'any' statutory violation." 516 U.S. at 512.

As expressly noted in the Sixth Circuit's opinion, Crosby did not sue to recover benefits under the terms of the Plan *because the Plan's lump sum provision requires payment of*

solely the Account Balance, the amount Bowater initially offered Crosby. Opinion (A-56 at n.5).[1] Additionally, while Article VIII of the Plan does not contemplate a forfeiture of the lump sum if the participant dies before NRA (which negates use of a preretirement mortality discount), Crosby could not recover under Article VIII because the benefit thereunder is payable solely to the participant's *beneficiary* or *estate*. Plan, Article VIII (A-121).[2] Therefore, if Crosby is to recover his shortfall, he must do so under ERISA §502(a)(3). Under Varity, awarding that relief under §502(a)(3) is inarguably appropriate.

Respondents posit, however, that Crosby is seeking declaratory relief available under ERISA §502(a)(1)(B). Although §502(a)(1)(B) authorizes a participant or beneficiary to bring suit "to clarify his rights to future benefits under the terms of the plan," Crosby could not seek such declaratory relief with respect to lump sums previously paid by the Plan. He also did not seek such declaratory relief with respect to *future* lump sums because, as just discussed, his right to additional benefits now or in the future derives from ERISA's anti-forfeiture rule, not an express Plan provision.

Not to be dissuaded, Respondents argue that ERISA's minimum vesting rules were designed to "ensure that plans provide the benefits they promise," and therefore Crosby's claim is for benefits under the terms of the Plan. RB at 11.[3] While §502(a)(1)(B) was clearly designed to ensure that plans pay promised benefits, as explained in ERISA's statement of policy, the vesting rules were designed to ensure that employees receive a certain minimum level of benefit *regardless*

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[1] In its Initial Decision on Crosby's claim, Bowater acknowledged that the Plan's lump sum provision was illegal. (See SA 6).

[2] Respondents' contention that Crosby did not raise this point below (RB at 14) is false, as Crosby made this same point in the District Court. See excerpt from Crosby's rely brief on remedies in the District Court (SA-29).

[3] ERISA's anti-forfeiture rule, ERISA §203(a)(2), is a vesting rule. See 29 U.S.C. §1053 (A-76) (entitled "Minimum vesting standards").

of what the plan promised. See 29 U.S.C. §1001 (A-71) ("Congressional findings and declaration of policy").

Respondents nevertheless insist that (1) ERISA's anti-forfeiture rule was designed to protect the "accrued benefit" determined under the Plan; and (2) therefore, "Crosby's 'statutory' claim to recover the 'accrued benefit' is a claim to enforce the Plan." RB at 11-12. Respondents apparently believe this argument brings the claim under the second clause of §502(a)(1)(B), which authorizes a participant or beneficiary to sue "to enforce his rights under the terms of the plan."

ERISA's anti-forfeiture rule prohibits the forfeiture of a vested accrued benefit unless the plan expressly provides for a forfeiture of the benefit upon the death of the participant. 29 U.S.C. §1053(a)(2)-(3) (A-73). Pursuant to Article VIII of the Plan, if the participant dies before NRA, "the vested present value of the Participant's Accrued Benefit" *will* be paid to his beneficiary or estate (i.e., it will not be forfeited). Plan, Article VIII (A-121). Thus, a participant possesses a right under Article VIII to have the vested present value of his "Accrued Benefit" paid to his beneficiary or estate if he dies before NRA. Crosby could not bring such a claim under *any* ERISA statute because, as Respondents note, by taking a lump sum, Crosby "extinguished any right his beneficiary might have had to ever receive such a benefit." RB at 14.

Yet, Respondents still argue that Crosby's claim falls under ERISA §502(a)(1)(B) because the Plan must be interpreted. RB at 12. ERISA §502(a)(1)(B) does not authorize a suit by a participant or beneficiary merely because a provision of a plan must be "interpreted." Rather, §502(a)(1)(B) authorizes a suit by a participant or beneficiary to (1) "recover benefits due him under the terms of the plan"; (2) "enforce his rights under the terms of the plan"; or (3) "clarify his rights to future benefits under the terms of the plan." 29 U.S.C. §1132(a)(1)(B) (A-76). As just discussed, although Article VIII must be interpreted to determine if the Plan calls for a forfeiture of the accrued benefit if the participant dies before NRA (and, therefore, whether a preretirement mortality discount may be utilized), none of the

remedies under §502(a)(1)(B) applies to Crosby's claim.

Respondents assert, however, that (1) Crosby claims that *the Plan* forbids Bowater from using a preretirement mortality discount; and (2) therefore, the dispute is about Plan interpretation.[4] RB at 12-13. This is an inaccurate and incomplete characterization of Crosby's claim. Crosby contends that *the anti-forfeiture rule* forbids Bowater from using a preretirement mortality discount because the Plan does not provide for a forfeiture of the lump sum if the participant dies before NRA. It provides just the opposite. Plan, Article VIII (A-121). Virtually *every* claim concerning a violation of ERISA's minimum benefit rules will require *some* plan interpretation. As is usually the case, however, the plaintiff will not be able to recover under §502(a)(1)(B).[5] Therefore, the fact that a provision of the plan must be interpreted will not alone bring the claim under that ERISA remedial provision.

Hopelessly entrenched in their plan interpretation argument, Respondents finally argue that Crosby's claim is for benefits due under the terms of the Plan because Bowater interpreted the Plan when it recalculated Crosby's lump sum. RB at 13. Even a cursory review of Bowater's Initial Decision on Crosby's Claim (SA-6) reveals that Bowater interpreted

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[4] In conjunction with this argument, Respondents argue that Crosby "acknowledged" in the courts below that he received the amount to which he was entitled under ERISA §205(g)(3) and Code §417(e)(3), commonly known as the present value rules. RB at 12. Crosby has never "acknowledged" that his lump sum complied with the present value rules. However, even if his lump sum *did* comply with the present value rules, pension plans must also comply with ERISA's anti-forfeiture rule.

[5] For example, if a pension plan required a participant to work in one division of the company for at least 3 years and in another division of the company for at least 5 years before the benefit was nonforfeitable, that would violate ERISA's minimum vesting rule, which requires the benefit to be nonforfeitable after 5 or 7 years of service. See 29 U.S.C. §1053(a) (A-76). Although the plan in this example would need to be interpreted to determine whether the rule was violated, a participant with only 7 years of service would clearly not seek recovery of his accrued benefit under the plan, but would seek recovery under ERISA's minimum vesting rule.

primarily the law and two Court of Appeals decisions, and did not even mention, much less interpret, Article VIII. In other words, Bowater understood that the claim concerned whether the lump sum complied with ERISA's minimum benefit rules, not whether it complied with an express Plan provision.

III. Like the Sixth Circuit, Respondents Misapprehend Great-West, Harris-Trust and Mertens.

Respondents cite Great-West for the proposition that "[a]n award of additional money for benefits is not available under §502(a)(3) because it constitutes money damages and is a form of *legal* relief." RB at 15. Great-West made no such sweeping pronouncement. On the contrary, Great-West (1) held that where the defendant is in possession of monies that rightfully belong to the plaintiff (other than pursuant to a contractual obligation),[6] the plaintiff is entitled to equitable restitution of those funds; and (2) emphasized in its discussion of Bowen v. Massachusetts, 487 U.S. 879 (1988), that a claim for money owed pursuant to a statutory obligation, is an equitable action for specific relief, not a suit for "money damages." Great-West, 534 U.S. at 213-215 and n. 2.

Recognizing that this Court's holdings in Great-West and Bowen undercut their argument that Crosby seeks legal relief, Respondents assert that the monies Crosby seeks are in a separate trust, and that the trust is not a party to the litigation. RB at 17. Like Respondents' other scattershot arguments, this one is a red herring. Obviously, if Respondents believed Crosby had sued the wrong party, they would have moved to dismiss. Of course, they did not because, under the Plan's own terms, the trust ("Trust") is part of the Plan, and it holds the funds contributed by Bowater to

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[6] Although Great-West held that a claim for money owed under an express plan provision constitutes a claim for legal relief (534 U.S. at 210, 211), that holding does not pertain to Crosby's claim, as Crosby seeks benefits owed under ERISA's anti-forfeiture rule, not an express Plan provision.

pay participants' benefits. Plan, §1.51, 1.52, 4.1, 4.4 (A-120).[7] Indeed, with respect to Plan assets, the Plan uses the terms "Plan" and "Trust" interchangeably. Id.[8]

Respondents next contend that Harris Trust & Savings Bank v. Salomon Smith Barney Inc., 530 U.S. 238 (2000), is inapposite because Salomon, a third-party transferee, fraudulently obtained plan funds; whereas, Respondents are not the wrongful recipients of funds that belong to Crosby. RB at 17. Harris Trust held that equitable restitution is available against both an *original* wrongdoer and culpable third-party transferees. 530 U.S. at 250-251. As importantly, without any suggestion that Salomon still *possessed* the funds, this Court held that the plan trustees could seek equitable restitution from Salomon of the wrongfully obtained funds. Id.

Respondents also argue that Mertens v. Hewitt Assocs., 508 U.S. 248 (1987), offers no support for Crosby's claim because the Court held that the plaintiffs there were seeking only compensatory damages. RB at 18. Respondents add that, in Great-West, this Court rejected the claim that trust law defines the "reach" of §502(a)(3). Crosby cited Mertens for its holding that restitution is available under ERISA §502(a)(3). 508 U.S. at 256 (1993). The fact that the plaintiffs *in Mertens* were not actually seeking restitution misses the point: *Crosby* is seeking restitution.[9] Furthermore, Crosby does not contend

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[7] In fact, §4.4 of the Plan explains that Bowater makes contributions to the Trust on the condition that the contributions are fully deductible (A-120). For contributions to be fully deductible, the trust must be part of the plan. 26 U.S.C. §401(a) and §404(a) (SA-1).

[8] Contrary to the allegation at page 17 of Respondents' brief, Crosby is not attempting to portray the Plan as an individual account plan.

[9] In Mertens, the plaintiffs (1) did not request an injunction and could not allege that the defendant, an actuarial firm, was in possession of the benefits they lost on account of the actuarial firm's alleged knowing participation in breaches of ERISA fiduciary duties; and (2)the actuarial firm had no control over the operation or administration of the plan. 508 U.S. at 250-51, 255, 262.

(continued...)

that trust law defines the "reach" of §502(a)(3); he contends that, as this Court has repeatedly held, trust law is the "starting point" for analyzing ERISA. See Petition at 17-19 (citing cases). Great-West rejected the trust-law remedy advanced by the plaintiff insurer (an injunction to enforce the plan's reimbursement provision) because the insurer's right to recover benefits from the plan beneficiary was based solely on an express plan provision, not an ERISA statutory violation. Therefore, the claim was essentially a claim for money due and owing under a contract, the "classic form" of legal relief. 534 U.S. at 210.

Lastly, Respondents submit that Bowen v. Massachusetts, 487 U.S. 879 (1988), is inapposite because (1) it focused on the meaning of the term "money damages"; (2) it involved an injunction regarding the calculation of *future* benefits; and (3) Crosby cannot seek such injunction because he is not entitled to a future lump sum from the Plan. RB at 19. Incredibly, Respondents add that there is "no meaningful difference" between contract-based claim to pay benefits and a statutory obligation to pay benefits. Id.

Throughout this litigation, Respondents have repeatedly characterized the relief sought by Crosby as "money damages," and rejected any notion that payment of the benefits owed Crosby under ERISA's anti-forfeiture rule would constitute equitable restitution. See, e.g., RB at 15, 16, 18. As explained in Great-West and Bowen, an action to enforce the payment of monies owed pursuant to a statutory obligation is an action for equitable relief, not an action for money damages. See Petition at 13-16 (quoting Bowen and Great-West). Because Great-West also explained that an action to enforce the payment of monies owed under an express plan provision is not sustainable under ERISA §502(a)(3), Respondents contention that there is no "meaningful" difference between contract claim and a statutory claim (here,

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[9](...continued)
On these facts, the Court concluded that plaintiffs were seeking only compensatory damages. Id.

for benefits owed under ERISA's anti-forfeiture rule) is more than a little disingenuous. Furthermore, as Respondents very well know, Crosby sought an injunction regarding the proper calculation of past *and future* lump sums; and, in the courts below, Crosby documented that he was entitled to an additional lump sum from the Plan in the future. See Petition at 27, n. 22. Bowen is indisputably on point.

As their final salvo, Respondents erroneously argue that the "crux" of the Petition is to convince the Court to change its rulings in Great-West. RB at 21. That obviously is not Crosby's intent. The relief Crosby seeks does not depend on the Court's departure from or modification of its holdings in Great-West. Rather, it depends on the Court's willingness to clarify that an award of benefits owed under ERISA's minimum benefit rules (and not under an express plan provision) constitutes "equitable restitution," a conclusion all but compelled by Great-West and Bowen. The eleven Circuit court decisions cited in the Petition and this Reply, all issued within the past year, demonstrate that the Circuits are in conflict as to the proper application of this Court's rulings in Great-West, with the result that participants and beneficiaries in the "right" Circuit may recover benefits lost on account of a violation of ERISA's standards, while thousands of others in the "wrong" Circuit may not. Clearly, this is an untenable and inequitable situation that begs for immediate resolution by this Court.

CONCLUSION

For the reasons set forth in the Petition and this Reply, Crosby respectfully requests that his Petition be granted.

Respectfully submitted on March 21, 2005 by,

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